

# **Exhibit 1**

07:34

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

WSOU INVESTMENTS, LLC \*  
DBA BRAZOS LICENSING \* February 23, 2023  
AND DEVELOPMENT \*  
\*  
VS. \* CIVIL ACTION NOS.  
\*  
DELL TECHNOLOGIES INC., \* W-20-CV-480/481/486  
DELL INC., EMC CORP \*  
AND VMWARE INC. \*

BEFORE THE HONORABLE ALAN D ALBRIGHT  
JURY TRIAL PROCEEDINGS  
Volume 3 of 3

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21 Proceedings recorded by mechanical stenography,  
07:36 22 transcript produced by computer-aided transcription.

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10:23 1 it is now apparently.

10:23 2 And my only point of telling you all this  
10:23 3 is when this witness appears, he'll be sworn just like  
10:23 4 the other witnesses that you'll have in this case. The  
10:23 5 fact that he is appearing remotely should not impact  
10:23 6 your opinion about his credibility, just like the  
10:23 7 witnesses who are here in person or who might appear by  
10:23 8 deposition.

10:23 9 You are the judges. You assess the  
10:23 10 credibility one way or the other of anything that he  
10:23 11 says. Take it into consideration. But don't -- he is  
10:23 12 of equal dignity appearing by Zoom as he would be here  
10:23 13 live.

10:23 14 So we'll take about a ten-minute recess.  
10:24 15 We'll get the Zoom set up and then we'll go on with  
10:24 16 that.

10:24 17 THE BAILIFF: All rise.

10:24 18 (Jury exited the courtroom.)

10:24 19 THE COURT: You may be seated.

10:24 20 Are you able, Mr. Rosenthal, while  
10:24 21 they're setting up, to make your motions?

10:24 22 MR. ROSENTHAL: Yes, Your Honor.

10:24 23 THE COURT: Okay.

10:24 24 MR. ROSENTHAL: So, Your Honor, we are  
10:24 25 going to file, if we haven't already, but we are going

10:24 1 to file, momentarily, a paper version of the motion.  
10:24 2 The motion that we're making is a Rule 50(a) motion and  
10:24 3 it will include a number of different bases.

10:24 4 But I want to focus any oral argument on  
10:24 5 really one basis that I think makes this a little bit  
10:24 6 of a different case than an ordinary case. And that is  
10:25 7 that the plaintiff in this case has not put on any  
10:25 8 evidence with respect to several critical limitations  
10:25 9 of the singular claim that is at issue in this case.

10:25 10 So as the Court is well aware, we're  
10:25 11 dealing with one apparatus claim, Claim 13, and that  
10:25 12 apparatus claim -- and I'm happy to put it up on the  
10:25 13 screen, although I think you remember it.

10:25 14 THE COURT: Yeah.

10:25 15 MR. ROSENTHAL: It has two and only two  
10:25 16 structural elements. There is a processor module and  
10:25 17 there is a switching module coupled to the processing  
10:25 18 module. I think it's called a processor module. I  
10:25 19 misspoke.

10:25 20 And as you know, we had a rough go of it  
10:25 21 with the direct testimony, but we have very, very  
10:25 22 carefully reviewed the transcript. We have searched  
10:25 23 for the word "processor module." We have searched for  
10:25 24 the word "switching module." We have searched for the  
10:25 25 word "coupled" to make sure that we're not

10:25 1 misunderstanding what was said.

10:25 2 But because Dr. McClellan did not have  
10:26 3 certain opinions and explanations in his report, the  
10:26 4 Court correctly excluded any testimony about certain  
10:26 5 things that --

10:26 6 THE COURT: I remember.

10:26 7 MR. ROSENTHAL: You remember. And so --  
10:26 8 it's hard to forget.

10:26 9 So here's the things that are missing.  
10:26 10 There was no testimony about what the processor module  
10:26 11 is in our device. All that was said was that we  
10:26 12 receive traffic, and we do, you know, things with that  
10:26 13 traffic. There was no testimony about what the  
10:26 14 processor module is.

10:26 15 There was also no testimony about what  
10:26 16 the switching module is. And the only thing, by the  
10:26 17 way, in the expert report that he could have said is  
10:26 18 that the switching module is the link scheduler.  
10:26 19 There's one, e.g., switching module. That's what -- he  
10:26 20 could have said that. He didn't. He didn't say  
10:26 21 anything.

10:26 22 And he certainly didn't say anything  
10:26 23 about whatever he thinks the processing module is and  
10:26 24 whatever he thinks the switching module is being  
10:27 25 coupled together.

10:27 1 The only testimony that he gave that even  
10:27 2 relates to those limitations was when counsel asked him  
10:27 3 those leading questions and said, do you agree that  
10:27 4 this limitation is met? Yes.

10:27 5 Do you agree that this limitation is met?  
10:27 6 Yes.

10:27 7 Did you look at source code to confirm  
10:27 8 that? Yes.

10:27 9 Did you look at documents? Yes.

10:27 10 And that's not testimony on which the  
10:27 11 jury can base a conclusion of infringement.

10:27 12 So the other thing that I want to note  
10:27 13 about that is these aren't just a couple of random  
10:27 14 limitations.

10:27 15 As the Court is well aware, there was a  
10:27 16 ex parte reexamination on this patent. Claim 1, which  
10:27 17 is a method claim for doing the same thing, was  
10:27 18 invalidated.

10:27 19 Claim 13 is an apparatus claim for doing  
10:27 20 the same thing. It was held valid on the sole basis,  
10:27 21 the examiner said, just because of these structural  
10:27 22 limitations. They're not in the prior art.

10:27 23 So this is literally the only thing  
10:27 24 holding this claim together. And the expert and WSOU  
10:28 25 put on zero evidence of the only two limitations of

10:28 1 this structural claim.

10:28 2           So this is why I think we're in the rare.  
10:28 3 And we understand the Court's practice is often to  
10:28 4 reserve on these sorts of things. This is really one  
10:28 5 of those cases where we ought not to be sending this  
10:28 6 case to the jury. There's nothing for them to decide.  
10:28 7 There's no evidence on which they could base a  
10:28 8 conclusion of infringement.

10:28 9           The last point I want to make, Your  
10:28 10 Honor, is on a different element of the claim. The  
10:28 11 last element of the claim talks about processing the  
10:28 12 packets such that packets that are destined for an  
10:28 13 egress node that is congested or handled differently  
10:28 14 with a different priority than packets that are sent to  
10:28 15 a non-congested node.

10:28 16           Again, we looked really carefully at the  
10:28 17 testimony last night because we have it so quickly.  
10:28 18 And there was zero testimony other than, "yes. I think  
10:28 19 that element is met," that showed how priorities are  
10:29 20 changed.

10:29 21           The witness testified about how he  
10:29 22 thought bandwidth was changed or that it is handled  
10:29 23 differently, but never did he explain how the  
10:29 24 priorities are changed. In fact, he testified that the  
10:29 25 priority is set based on traffic type, which is exactly



10:29 1 how the product works.

10:29 2 But he never -- and look. If he had  
10:29 3 said, but here's why I think that means changing the  
10:29 4 priority, that's, you know, that's fine. He didn't.  
10:29 5 He just didn't.

10:29 6 He -- and I understand that he was in a  
10:29 7 difficult position because he hadn't offered those  
10:29 8 opinions, but it's just not in the record.

10:29 9 And so, Your Honor, we move for judgment  
10:29 10 under Rule 50(a) that there is no infringement. We  
10:29 11 also have bases that are going to be addressed in the  
10:29 12 papers, but I would really like just to focus on that  
10:29 13 part.

10:29 14 THE COURT: And for the record, I think  
10:29 15 it was raised through my law clerk, the issue that you  
10:29 16 all -- the defendant has an issue on 101.

10:29 17 MR. ROSENTHAL: We do. You're right.

10:29 18 THE COURT: But on that, I'm going to  
10:30 19 wait to decide that until -- setting aside what we're  
10:30 20 going to do right now, I'm not going to take up the 101  
10:30 21 right now. I'll take that up at the end of trial.

10:30 22 MR. ROSENTHAL: I figured as much. That  
10:30 23 is in our papers. We also addressed -- just so you're  
10:30 24 not surprised, we also addressed the standing because  
10:30 25 our appellate folks believed that we ought to put that

11:27 1 between every endpoint, so it's collecting node  
11:27 2 information.

11:27 3 And then he struck that -- that last part  
11:27 4 of that answer was stricken as an objection by  
11:27 5 Mr. Rosenthal, but I wanted to make sure the Court was  
11:27 6 aware of that citation in the record as well.

11:27 7 THE COURT: Anything else, Mr. Rosenthal?

11:27 8 MR. ROSENTHAL: No, Your Honor.

11:28 9 (Off-the-record bench conference.)

11:28 10 THE COURT: The Court is going to grant  
11:28 11 the motion for directed verdict.

11:28 12 The plaintiff will have an opportunity to  
11:28 13 file a written response to the defendants' motion. You  
11:28 14 all can do whatever normal back-and-forth pleading  
11:28 15 there is, and then we will -- because we'll need to get  
11:28 16 a written order up for it.

11:28 17 So that takes care of the case. I will  
11:28 18 talk to the jury and let them know that we have  
11:28 19 resolved the case.

11:28 20 And I thank you for being here.

11:28 21 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )  
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5 I, Kristie M. Davis, Official Court  
6 Reporter for the United States District Court, Western  
7 District of Texas, do certify that the foregoing is a  
8 correct transcript from the record of proceedings in  
9 the above-entitled matter.

10 I certify that the transcript fees and  
11 format comply with those prescribed by the Court and  
12 Judicial Conference of the United States.

13 Certified to by me this 26th day of  
14 February 2023.

15  
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